IN THE BOMBAY HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.266 OF 2003

Oil & Natural Gas Corporation Ltd. ... Petitioners.

vs.

Neptune Exploration & Industries Ltd. ... Respondents.

Mr.Rajeev Kumar i/b. M/s.M.Dhruva & Co., for Petitioners.

Mr.Pradip Sancheti with Ashwin Shanker i/b. R.A.Fernandes, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 15th March, 2005.

P.C.:-

1. By this petition, the petitioners challenge the Award made by the Arbitral Tribunal. The dispute between the parties that was referred to the Arbitration was as to whether under the Contract between the petitioners and

the respondents, the petitioners were liable to pay to the respondents any amount on account of fluctuation in foreign exchange rate in respect of the tax deducted by the respondents out of the amounts payable by the respondents to the foreign company namely Noble Asset Company Limited, Ugland House, Cayman Islands, British West Indies. The relevant clause in the contract is clause 7.5 which reads as under:-

> "7.5. PAYMENT IN INDIAN RUPEES
>
> Contractor shall receive payment from Company in Indian Rupees only but Company would pick-up the exchange rate variation on the Foreign Exchange component of the Contractor.
>
> The Foreign Exchange (FE) requirement would not exceed the limit of US $ 47,000.00 (U.S.Dollars Forty Seven thousand only) per day. Company shall adjust the fluctuation in the above FE requirement against proof of remittance made against this agreement. For the adjustment, the reference rate would be taken as US $ 1 = Rs.36.54 (BC selling rate of exchange as intimated by SBI at the closing hours of the previous day of opening of bid) and any difference either way from the

> reference rate to the BC selling exchange rate as on the date of remittance or thirty days from the date of receipt of monthly payment from the Company, whichever is lower, would be adjustable in Indian Rupees."

Because of the provisions of the Income Tax Act, out of the amount that was payable by the Respondents to the foreign company whose Rig was hired by the Respondents, the amount payable as Income Tax by the foreign company in India was required to be deducted by the respondents and paid over to the Income Tax Department. The case of the petitioners was that the amount of the Income Tax liability was not paid in foreign exchange by the respondents and therefore, clause 7.5 is not applicable. I have heard learned counsel for both the sides on this aspect of the matter. I find that the Arbitral Tribunal has rightly interpreted the provisions of clause 7.5 and the provisions of Income Tax Act. The following paragraph from the Award in my opinion, is relevant which reads as under:-

> The rationale behind the provision relating to adjustment of fluctuation in the foreign exchange rate is that if in respect of any

amount which is payable or paid to the Foreign Company in terms of foreign currency, namely, US Dollars, the Claimant is required to incur a liability, which in terms of Rupees exceeds the liability computed at the rate of Rs.36.54 per Dollar, then the difference or the additional liability will be reimbursed by ONGC. Once this rationale behind incorporation of Clause 7.5 is appreciated, it will at once be clear that the liability which the Claimant incurred in terms of Indian Rupees must primarily be computed in respect of the total value of the Invoice in terms of the rate of Rs.36.54 per Dollar and the prevalent rate at which the claimant will have to bear the liability if the total amount of the invoice including the tax deducted would have been paid to the Foreign Company. Once this amount is arrived at, namely, the total value of the Invoice multiplied by the prevalent rate, then for a proper working of Clause 7.5 the liability has to be split up into two parts, namely, the amount in terms of Indian Rupees utilised for the purchase of US Dollars to be paid to the Foreign Company and the amount in terms of

Rupees computed at the prevalent rate with regard to the deduction in terms of Dollars of the amount payable by way of income tax. Since under the provisions of the Act this amount of tax deducted is considered statutorily as a payment to the Foreign Company and as income of the Foreign Company, the word “remittance” if it is construed as meaning payment, the Claimant would clearly have satisfied the contractual requirement of furnishing proof of remittance.

The word “remittance” cannot, in the context of the provisions of the contract, be given a narrow meaning so as to restrict it only to remittance abroad. The word “remittance”, in the instant case, has to be given its normal meaning which would mean payment to a Foreign Company or payment to any other statutory authority for and on behalf of the Foreign Company and to be treated as income of the Foreign Company. We have, therefore, no doubt that having regard to the object and the intention with which Clause 7.5 was incorporated, namely, that if the Claimant incurs any liability in respect of any payment required to be made to the Foreign Company

> either directly or which by virtue of a deeming fiction provided by a statute can be treated as paid to the Foreign Company, then the liability, which would have been computed in excess of the basic rate of Rs.36.54 per Dollar, the Claimant was clearly entitled to be compensated for the additional amount computed by taking into account the basic rate and the rate at which the Claimant had to discharge the liability to the Foreign Company. Accordingly, in our view, the Claimant's claim for the foreign exchange fluctuation in respect of the amount withheld by way of taxes, which was deposited with the Income Tax Authorities in terms of Indian Rupees at the prevalent rate of foreign exchange, will have to be allowed as it is obvious that ONGC was not justified in rejecting the said claim."

In my opinion, to say the least, the view that has been taken by the Arbitral Tribunal of clause 7.5 of the Contract between the parties, is a possible view and therefore, it cannot be interfered with.

2. It was submitted on behalf of the petitioners

that under the contract, reimbursement can be claimed by the Respondents from the Petitioners upon submitting proof of work performed or expenses incurred. In so far as the claim regarding TDS is concerned, according to the petitioners, the respondents, in the statement of claim, had stated that the claim was not towards the expenditure incurred. The relevant statement from the statement of claim which was pointed out, reads as under:-

> "The withheld taxes were remitted to the Government authorities after converting them into equivalent Indian rupees at the prevailing exchange rate. The balance amount was actually remitted abroad. The withheld amounts were also remitted to the Government authorities. Proof of this remittance has been provided to the Respondents. This is in compliance with the various Double Taxation Avoidance Agreements that India has entered into with respective countries and the Income Tax Act 1961. This withholding of tax is not expenditure incurred by the Claimants to be on account of taxes, duties etc. as provided in Clause 15.4(c) of the agreement. Such withholding of taxes only represents the action taken by the Claimants to comply with the law of the land and in no way

> indicative or crystallisation of the actual tax liability of the foreign recipient in India. The tax liability of the foreign parties is finalised on the basis of their corporate tax returns and as per the assessment done by the tax authorities."

According to the petitioners, as the amount was not being paid towards the services rendered, the payment could not have been made under the contract. In my opinion, the said contention is not well founded. What is stated in the statement of claim which is quoted above is that this payment is not made on account of services rendered as provided in clause 15.4 of the Agreement. The payment for T.D.S is not to be claimed separately. Under the contract, payment would be made to the Respondents by the petitioners either towards the work performed or the services rendered and after working out the amount payable, out of that amount, certain portion would be paid to the Income Tax Department towards the TDS liability. Thus, the amount of TDS is not required to be separately claimed. Really speaking, the petitioners are not concerned with the TDS liability of the Foreign Company. The petitioners get connected with the TDS liability of the Foreign company to the same extent to

which it is connected with the other payment to be made to the Foreign Company. The connection of the petitioners is only to the extent of fluctuation in the rate of foreign exchange.

3. It was next urged that the respondents have not produced the proof of having paid the amount to the Income Tax Department. However, in the Award, it is stated that at the oral hearing this point was not seriously argued. In other words, at the oral arguments before the Arbitral Tribunal, this point was not pressed. In the petition, I do not find any statement made by the petitioners that this observation made in the Award is not correct. In the absence of such statement that point cannot be allowed to be raised. Taking overall view of the matter therefore, the Award impugned in the petition cannot be disturbed by this Court in its limited jurisdiction under section 34 of the Arbitration and Conciliation Act,1996. The petition is therefore, disposed of. The petitioners are directed to pay costs to the Respondents as incurred by the Respondents.

15.3.2005 ---